

close a covered interstate branch, the FDIC will issue to the bank a notice of the FDIC's intent to order the closure and will schedule a hearing within 60 days of issuing the notice.

(c) *Hearing.* The FDIC will conduct a hearing scheduled under paragraph (b) of this section in accordance with the provisions of 12 U.S.C. 1818(h) and 12 CFR part 308.

PART 370—TEMPORARY LIQUIDITY GUARANTEE PROGRAM

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SOURCE: 73 FR 72266, Nov. 26, 2008, unless otherwise noted.

§ 370.1 Scope.

This part sets forth the eligibility criteria, limitations, procedures, requirements, and other provisions related to participation in the FDIC's temporary liquidity guarantee program.

§ 370.2 Definitions.

As used in this part, the terms listed in this section are defined as indicated below. Other terms used in this part that are defined in the Federal Deposit Insurance Act (FDI Act) have the meanings given them in the FDI Act except as otherwise provided herein.

(a) *Eligible entity.*

(1) The term “eligible entity” means any of the following:

(i) An insured depository institution;

(ii) A U.S. bank holding company, provided that it controls, directly or indirectly, at least one subsidiary that

is a chartered and operating insured depository institution;

(iii) A U.S. savings and loan holding company, provided that it controls, directly or indirectly, at least one subsidiary that is a chartered and operating insured depository institution; or

(iv) Any other affiliates of an insured depository institution that the FDIC, in its sole discretion and on a case-by-case basis, after written request and positive recommendation by the appropriate Federal banking agency, designates as an eligible entity; such affiliate, by seeking and obtaining such designation, also becomes a participating entity in the debt guarantee program.

(b) *Insured Depository Institution.* The term “insured depository institution” means an insured depository institution as defined in section 3(c)(2) of the FDI Act, 12 U.S.C. 1813(c)(2), except that it does not include an “insured branch” of a foreign bank as defined in section 3(s)(3) of the FDI Act, 12 U.S.C. 1813(s)(3), for purposes of the debt guarantee program.

(c) *U.S. Bank Holding Company.* The term “U.S. Bank Holding Company” means a “bank holding company” as defined in section 2(a) of the Bank Holding Company Act of 1956 (“BHCA”), 12 U.S.C. 1841(a), that is organized under the laws of any State or the District of Columbia.

(d) *U.S. Savings and Loan Holding Company.* The term “U.S. Savings and Loan Holding Company” means a “savings and loan holding company” as defined in section 10(a)(1)(D) of the Home Owners' Loan Act of 1933 (“HOLA”), 12 U.S.C. 1467a(a)(1)(D), that is organized under the laws of any State or the District of Columbia and either:

(1) Engages only in activities that are permissible for financial holding companies under section 4(k) of the BHCA, 12 U.S.C. 1843(k), or

(2) Has at least one insured depository institution subsidiary that is the subject of an application under section 4(c)(8) of the BHCA, 12 U.S.C. 1843(c)(8), that was pending on October 13, 2008.

(e) *Senior Unsecured Debt.*

(1) The term “senior unsecured debt” means

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(i) For the period from October 13, 2008 through December 5, 2008, unsecured borrowing that:

(A) Is evidenced by a written agreement or trade confirmation;

(B) Has a specified and fixed principal amount;

(C) Is noncontingent and contains no embedded options, forwards, swaps, or other derivatives; and

(D) Is not, by its terms, subordinated to any other liability; and

(ii) After December 5, 2008, unsecured borrowing that satisfies the criteria listed in paragraphs (e)(1)(i)(A) through (e)(1)(i)(D) of this section and that has a stated maturity of more than 30 days.

(iii) After February 27, 2009, unsecured borrowing that satisfies the criteria listed in paragraphs (e)(1)(i)(A) through (e)(1)(i)(D) of this section, that has a stated maturity of more than 30 days, and that includes, without limitation, mandatory convertible debt.

(2) Senior unsecured debt may pay either a fixed or floating interest rate based on a commonly-used reference rate with a fixed amount of scheduled principal payments. The term “commonly-used reference rate” includes a single index of a Treasury bill rate, the prime rate, and LIBOR.

(3) Senior unsecured debt may include, for example, the following debt, provided it meets the requirements of paragraph (e)(1) of this section: mandatory convertible debt as described in paragraph (m) of this section, federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, including zero-coupon bonds, U.S. dollar denominated certificates of deposit owed to an insured depository institution, an insured credit union as defined in the Federal Credit Union Act, or a foreign bank, U.S. dollar denominated deposits in an international banking facility (IBF) of an insured depository institution owed to an insured depository institution or a foreign bank, and U.S. dollar denominated deposits on the books and records of foreign branches of U.S. insured depository institutions that are owed to an insured depository institution or a foreign bank. The term “foreign bank” does not include a foreign central bank or other similar foreign government entity that performs cen-

tral bank functions or a quasi-governmental international financial institution such as the International Monetary Fund or the World Bank. References to debt owed to an insured depository institution, an insured credit union, or a foreign bank mean owed to the institution solely in its own capacity and not as agent.

(4) Senior unsecured debt, except deposits, may be denominated in foreign currency.

(5) Senior unsecured debt excludes, for example, any obligation that has a stated maturity of “one month”¹ obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debts that are paired or bundled with other securities, convertible debt other than mandatory convertible debt described in paragraph (m) of this section, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, deposits denominated in a foreign currency or other foreign deposits (except as allowed under paragraph (e)(3) of this section), revolving credit agreements, structured notes, instruments that are used for trade credit, retail debt securities, and any funds regardless of form that are swept from individual, partnership, or corporate accounts held at depository institutions. Also excluded are loans from affiliates, including parents and subsidiaries, and institution-affiliated parties.

(f) *Newly issued senior unsecured debt.*

(1) The term “newly issued senior unsecured debt” means :

(i) With respect to a participating entity that opted out of the debt guarantee program, senior unsecured debt that is issued on or after October 14, 2008, and on or before the date the entity opted out; and

(ii) With respect to a participating entity that has not opted out of the debt guarantee program, senior unsecured debt that is issued during the issuance period.

(2) The term “newly issued senior unsecured debt” includes, without limitation, senior unsecured debt

¹This recognizes that certain instruments have stated maturities of “one month,” but have a term of up to 35 days because of weekends, holidays, and calendar issues.

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(i) That matures and is renewed during the issuance period; or

(ii) That is issued during such period pursuant to a shelf registration, regardless of the date of creation of the shelf registration.

(g) *Participating entity.* The term “participating entity” means with respect to each of the debt guarantee program and the transaction account guarantee program,

(1) An eligible entity that became an eligible entity on or before December 5, 2008 and that has not opted out, or

(2) An entity that becomes an eligible entity after December 5, 2008, and that the FDIC has allowed to participate in the program, except that a participating entity that opts out of the transaction account guarantee program in accordance with §370.5(c)(2) ceases to be a participating entity in the transaction account guarantee program effective on January 1, 2010.

(h) *Noninterest-bearing transaction account.* (1) The term “noninterest-bearing transaction account” means a transaction account as defined in 12 CFR 204.2 that is

(i) Maintained at an insured depository institution;

(ii) With respect to which interest is neither accrued nor paid; and

(iii) On which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal.

(2) A noninterest-bearing transaction account does not include, for example, an interest-bearing money market deposit account (MMDA) as those accounts are defined in 12 CFR 204.2.

(3) Notwithstanding paragraphs (h)(1) and (h)(2) of this section, for purposes of the transaction account guarantee program, a noninterest-bearing transaction account includes:

(i) Accounts commonly known as Interest on Lawyers Trust Accounts (IOLTAs) (or functionally equivalent accounts); and

(ii) Negotiable order of withdrawal accounts (NOW accounts) with interest rates no higher than 0.50 percent if the insured depository institution at which the account is held has committed to maintain the interest rate at or below 0.50 percent.

(4) Notwithstanding paragraph (h)(3) of this section, a NOW account with an interest rate above 0.50 percent as of November 21, 2008, may be treated as a noninterest-bearing transaction account for purposes of this part, if the insured depository institution at which the account is held reduces the interest rate on that account to 0.50 percent or lower before January 1, 2009, and commits to maintain that interest rate at no more than 0.50 percent at all times during the period in which the institution is participating in the transaction account guarantee program.

(i) *FDIC-guaranteed debt.* The term “FDIC-guaranteed debt” means newly issued senior unsecured debt issued by a participating entity that meets the requirements of this part for debt that is guaranteed under the debt guarantee program, and is identified pursuant to §370.5(h) as guaranteed by the FDIC.

(j) *Debt guarantee program.* The term “debt guarantee program” refers to the FDIC’s guarantee program for newly issued senior unsecured debt as described in this part.

(k) *Transaction account guarantee program.* The term “transaction account guarantee program” refers to the FDIC’s guarantee program for funds in noninterest-bearing transaction accounts as described in this part.

(l) *Temporary liquidity guarantee program.* The term “temporary liquidity guarantee program” includes both the debt guarantee program and the transaction account guarantee program.

(m) *Mandatory convertible debt.* The term “mandatory convertible debt” means senior unsecured debt that is required by the terms of the debt instrument to convert into common shares of the issuing entity on a fixed and specified date, on or before the expiration of the guarantee, unless the issuing entity:

(1) Fails to timely make any payment required under the debt instrument, or

(2) Merges or consolidates with any other entity and is not the surviving or resulting entity.

(n) *Issuance period.*

(1) Except as provided in paragraph (n)(2) of this section, the term “issuance period” means

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(i) With respect to the issuance, by a participating entity that is either an insured depository institution, an entity that has issued FDIC-guaranteed debt before April 1, 2009, or an entity that has been approved pursuant to § 370.3(h) to issue FDIC-guaranteed debt after June 30, 2009, and on or before October 31, 2009, of:

(A) Mandatory convertible debt, the period from February 27, 2009, to and including October 31, 2009, and

(B) All other senior unsecured debt, the period from October 14, 2008, to and including October 31, 2009; and

(ii) With respect to the issuance, by any other participating entity, of

(A) Mandatory convertible debt, the period from February 27, 2009, to and including June 30, 2009, and

(B) All other senior unsecured debt, the period from October 14, 2008, to and including June 30, 2009.

(2) The “issuance period” for a participating entity that has been approved to issue FDIC-guaranteed debt pursuant to § 370.3(k) of this part is the period after October 31, 2009, and on or before April 30, 2010.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 9524, Mar. 4, 2009; 74 FR 12082, Mar. 23, 2009; 74 FR 45098, Sept. 1, 2009; 74 FR 54747, Oct. 23, 2009]

§ 370.3 Debt Guarantee Program.

(a) Upon the uncured failure of a participating entity to make a timely payment of principal or interest as required under an FDIC-guaranteed debt instrument, the FDIC will pay the unpaid principal and/or interest, in accordance with § 370.12 and subject to the other provisions of this part.

(b) *Debt guarantee limit.*

(1) Except as provided in paragraphs (b)(2) through (b)(6) of this section, the maximum amount of outstanding debt that is guaranteed under the debt guarantee program for each participating entity at any time is limited to 125 percent of the par value of the participating entity’s senior unsecured debt, as that term is defined in § 370.2(e)(1)(i) (excluding mandatory convertible debt), that was outstanding as of the close of business September 30, 2008 and that was scheduled to mature on or before June 30, 2009.

(2) If a participating entity that is an insured depository institution had either no senior unsecured debt as that term is defined in § 370.2(e)(1)(i), or only had federal funds purchased, outstanding on September 30, 2008, its debt guarantee limit is two percent of its consolidated total liabilities as of September 30, 2008. For the purposes of this paragraph (b)(2) of this section, the term “federal funds purchased” means:

(i) For insured depository institutions that file Reports of Condition and Income, unsecured “federal funds purchased” as that term is used in defining “Federal Funds Transactions” in the Glossary of the FFIEC Reports of Condition and Income Instructions, and

(ii) For insured depository institutions that file Thrift Financial Reports, “Federal Funds” as that term is defined in the Glossary of the 2008 Thrift Financial Report Instruction Manual.

(3) If a participating entity, other than an insured depository institution, had no senior unsecured debt as that term is defined in § 370.2(e)(1)(i) outstanding on September 30, 2008, the entity may seek to have some amount of debt covered by the debt guarantee program. The FDIC, after consultation with the appropriate Federal banking agency, will decide, on a case-by-case basis, whether such a request will be granted and, if granted, what the entity’s debt guarantee limit will be.

(4) If an entity becomes an eligible entity after October 13, 2008, the FDIC will establish the entity’s debt guarantee limit at the time of such designation.

(5) If an affiliate of a participating entity is designated as an eligible entity by the FDIC after a written request and positive recommendation by the appropriate Federal banking agency (or if the affiliate has no appropriate Federal banking agency, a written request and positive recommendation by the appropriate Federal banking agency of the affiliated insured depository institution), the FDIC will establish the entity’s debt guarantee limit at the time of such designation.

(6) The FDIC may make exceptions to an entity’s debt guarantee limit. For